Date of Hearing: June 22, 1999

ASSEMBLY COMMITTEE ON JUDICIARY
Sheila James Kuehl, Chair
SB 209 (Burton) – As Amended: March 3, 1999

SUBJECT: DECEASED CELEBRITIES' HEIRS: NEW STATUTORY PROTECTIONS

KEY ISSUES:

1) SHOULD THE LAW PROTECTING THE USE OF IMAGES OF DECEASED CELEBRITIES BE BROADENED TO BETTER PROTECT THE PROPERTY RIGHTS OF THEIR HEIRS?

2) SHOULD THE STATE OF DOMICILE OF A DECEASED CELEBRITY, AT THE TIME OF HIS OR HER DEATH, BE RELEVANT IN ASSESSING WHETHER CALIFORNIA LAW PROTECTING THE PROPERTY RIGHTS OF THEIR HEIRS IS APPLICABLE?

3) WILL ELIMINATING THE SPECIFIC LIST OF THE TYPES OF USES OF IMAGES OF DECEASED CELEBRITIES WHICH DO NOT REQUIRE CONSENT OF HEIRS HAVE THE UNINTENDED EFFECT OF CHILLING FREE SPEECH AND BREEDING LITIGATION?

4) DID THE NINTH CIRCUIT COURT OF APPEALS IN ROBYN ASTAIRE V. BEST VIDEO APPEAR TO UNDULY FOCUS ON "FORM" OVER "SUBSTANCE"?

SUMMARY: Seeks to provide greater protections to the heirs of deceased celebrities by broadening the right to publicity that is descendible to them. Specifically, this bill:

1) Eliminates the 15 year old statutory list specifying the types of uses of a deceased celebrity's name, voice, signature, photograph or likeness (hereafter "image") which do not require consent of the heirs, and replaces the list with a broad protective statement that the consent requirements of this statute "shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press."

2) Extends, from 50 to 70 years after the death of celebrity, the time in which a person may be subject to liability for the use of a deceased celebrity's image, without consent, on or in products, merchandise or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services.

3) Requires the Secretary of State to post on the Internet its registry of persons claiming to be a successor-in-interest to the rights of a deceased celebrity or a registered licensee of such rights.

4) Provides for the application of this California law "if any of the acts giving rise to this action occurred in this state, whether or not the decedent was a domiciliary of this state at the time of death,"

regardless of how substantial or minimal the acts may be, and regardless of whether the damages occurred in this state.

EXISTING LAW:

1) Guarantees the right of every person to "freely speak, write and publish his or her sentiments on all subjects, and provides that no law shall restrain or abridge liberty of speech or press." (California Constitution Article 1, section 2.)

2) Imposes liability on any person who uses a deceased personality's name, voice, signature, photograph, or likeness in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent of the heirs or others whom the right to consent has been transferred. (Civil Code section 990. All further references are to this code unless otherwise noted.)

3) Provides that, notwithstanding (2), above, no consent is required for the use of a deceased personality's name, voice, signature, photograph or likeness in a play, book, magazine, newspaper, musical composition, film, radio or television program, in material that is of political or newsworthy value, a single and original work of fine art, or an advertisement or commercial announcement for any of these uses. (Section 990(n).) Use of a name, voice, signature, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, does not constitute a use for which consent is required. (Section 990(j).)

4) Creates a right to publicity, imposing liability on any person who knowingly uses another's name, voice, signature, photograph, or likeness of a living personality, in any manner, on or in products, merchandise, or goods, or for purpose of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent. Use in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required. (Section 3344.)

5) Provides that every person has the right of protection from personal insult and defamation. (Section 43.) These rights are not descendible, however, and thus no civil action lies to protect the interest of heirs or the estate in the good name of a decedent. (Lugosi v. Universal Pictures (1979) 25 Cal.3d 813; Werner v. Times Mirror Co. (1961) 193 Cal.App.2d 111; Kelly v. Johnson Publishing Co. (1958) 160 Cal.App.2d 718.)

6) Provides, as the tort of intrusion, that a person who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private concerns is subject to liability for invasion of privacy if the intrusion would be highly offensive to a reasonable person. (Restatement Second of Torts, section 652B. See also, Shulman v. Group W. Productions (1998) 18 Cal.4th 200, 230 – 31; Miller v. National Broadcasting Co. (1986) 187 Cal.App.3d 1463, 1482.) Protection from invasion of privacy is also not a descendible right. (Lugosi v. Universal Pictures (1979) 25 Cal.3d 813.)

7) Provides that copyright in a work created on or after January 1, 1978 endures for the life of the author and 70 years after the author's death. For works created before January 1, 1978, but not previously

in the public domain or copyrighted, the term of the copyright shall also be for 70 years. (17 U.S.C. sections 302 and 303.)

8) Provides that the descendible right to publicity created by California law applies only if the decedent was domiciled in California at the time of his or her death. (Lord Simon Cairns v. Franklin Mint Company (1998) 24 F.Supp.2d 1013.)

9) Prohibits one state from imposing liability upon an individual or entity for acts that were lawful in the state where they occurred, providing that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." (BMW of North America, Inc. v. Gore (1996) 517 U.S. 559, 572 - 573.)

FISCAL EFFECT: Unknown

COMMENTS: According to the author, this legislation is needed to help prevent the improper use of celebrities' hard-earned images once they are no longer here to protect them themselves. He states:

> We are living in an era when images of prominent artists, living and deceased, are used to sell and promote an increasing variety of products in every conceivable medium at a time when advancing technology provides the means for virtually unlimited manipulation of images and their instantaneous distribution. When image thieves step in, there's no limit to the extent of the damage that can be done to the integrity of (an artist's) career and vision. To the extent the misuse is distributed widely, the damage done is irreparable, even if owners of the rights win an exhaustive lawsuit. Not only do authorized users suffer by this theft, but owners of the rights lose important compensation, on which many heirs-widows, children and others-depend on to live.

The author asserts that there are too many loopholes in existing law which allow persons to wrongfully profit from a celebrity's hard work and deprive their heirs of a rightful inheritance. The author points to the Astaire decision (discussed below) as an example of the need for this bill saying, "[T]he court limited the application of section 990, remarkably finding that Best Video's use of Mr. Astaire dancing in introductory film clips of a dance instruction video was not a commercial appropriation of his image. This kind of exploitation is exactly what 990 was designed to prevent, not protect. If Best had put Mr. Astaire's image on a T-shirt, the court would have prevented the marketing of the product. Because the image of Mr. Astaire dancing was used in a product which took the form of a video, the court reasoned that the 'film' exception under CC 990(n) protected the use. The problem with this analysis is that the court has elevated form over content."

According to the author, the reading of section (n) by the Astaire court creates "a situation where a collection of iron-on appliques bearing the likeness of an athlete or movie star would be exempt from the statute simply because the form of the product appeared as a 'book' and books are on the section (n) list of exemptions. Another example: take a magazine comprised of nothing but photographs of River Phoenix. The law would not allow the photographs alone to be sold; however by merely changing the form from a photograph into a series of photos in a 'Magazine' the vendor could skirt the law." This is not mere conjecture, the author asserts, as the Astaire decision has already been cited by at least one court

applying Civil Code section 990 as narrowing the law. *(*Comedy III Productions, Inc. v. Gary Saderup, Inc., et al (1998) 68 Cal. App. 4th 744.)

The author also points to the fact that the Consumer Federation of California has written in strong support of the bill, writing that, "One of the strongest interests consumers have is the use over their own name, voice, signature, photograph and likeness. This bill would benefit consumers by providing additional protection against unauthorized commercial use after a personality's death." The author notes that other support comes from victims of crime who are concerned about the unauthorized use of victims of crime as portrayed in true crime dramas, and the AFL-CIO who support the rights of creative artists to enjoy the fruits of their labor.

The bill seeks to strengthen the property rights of the heirs of deceased celebrities by eliminating the current list specifying the types of uses of a deceased celebrity's name, voice, signature, photograph or likeness which do not require consent of the heirs, and replacing that approach with the broadest statement possible, stating simply that the consent requirements of this statute "shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press."

Before turning to a discussion of the background of California's "deceased celebrity statute," a brief look at the state's privacy protections might be helpful.

Privacy Rights Under California and Common Law. The law of privacy comprises four distinct kinds of invasion of four different interests: intrusion upon the plaintiff's seclusion or solitude, public disclosure of private facts about the plaintiff's personal life, publicity that places the plaintiff in a false light in the public eye, and appropriation of the plaintiff's name or likeness for commercial purposes. (Zacchini v. Scripps-Howard Broadcasting Company (1977) 433 U.S. 562 n.7, *citing* Prosser, Privacy, 48 Calif.L.Rev 383.) California courts have recognized each of these types of privacy, and California just last year enacted a statutory complement to the common law tort of intrusion (SB 262 (Burton) 1998 Stats. Ch. 1000.) This bill addresses the fourth branch of these privacy torts, commercial appropriation of a person's name or likeness.

Descendible Right to Publicity: Statutory Backdrop. In 1984, California, by statute, created an exception to the general rule that the privacy rights described above end with the death of the celebrity. This was done solely for the right to publicity, and is enunciated in Civil Code section 990, which this bill seeks to amend. Defamation and other forms of invasion of privacy, however, remain rights that inure to the benefit only of a living person. The person defamed, or whose privacy has been invaded, must bring the action. California law does not recognize a descendible right to such defamation and privacy claims, though opponents claim this legislation effectively seeks to do so.

An examination of the Assembly Judiciary Committee's analysis in 1984 of SB 613 (Campbell), the measure creating California's descendible right to privacy, is helpful in understanding the extent of the rights being provided. The analysis noted that "the bill is intended to address circumstances in which (a) commercial gain is had through the exploitation of the name, voice, signature, photograph, or likeness of a celebrity or public figure in the marketing of goods or services or (b) a celebrity or public figure is subject to abuse or ridicule in the form of a marketed product. Such goods or services typically involve

the use of a deceased celebrity's name or likeness, e.g., on posters, T-shirts, porcelain plates, and other collectibles; in toys, gadgets, and other merchandise; in look-alike services."

The bill stemmed from two California Supreme Court cases, Lugosi v. Universal Pictures (1979) 25 Cal.3d 813 and Guglielmi v. Spelling-Goldberg Productions (1979) 25 Cal.3d 860, which found that California's statutory right to publicity was not transferable upon death, such that the heirs of deceased celebrities had no statutory protections at all. The bill, therefore, sought to create a statutory descendible right to publicity. The right adopted was similar, though not identical to, the right to publicity that had been existence for more than 10 years prior for living celebrities.

At the time SB 613 was heard in the Assembly Judiciary Committee, the bill provided that "nothing in this section shall be construed to derogate from any rights protected by constitutional guarantees of freedom of speech or freedom of the press, such as the right to use a deceased personality's name, voice, signature, photograph, or likeness in a play, book, magazine, newspaper, film, television program, or similar medium of expression, to the to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press."

Importantly for purposes of this legislation, the expansive First Amendment approach was removed from the bill by the Committee in 1984 in favor of the current specific list of exemptions in Section 990. The Committee analysis questioned the non-specific nature of the list, and noted that "irrespective of this" stated intent to exclude works protected by freedom of speech or freedom of the press, "a defendant who has used a person's name, voice, etc. without authorization may assert a First Amendment privilege." The Ninth Circuit Court of Appeals held that "by deleting this language, the Legislature demonstrated an intent to adopt a broader exemption [to protect expressive works] that was not limited to constitutionally protected uses." (Robyn Astaire v. Best Film & Video (1997) 116 F.3d 1297, amended by 136 F.3d 1208, *cert. denied* 119 S.Ct. 161.)

Impetus for this Legislation: Robyn Astaire v. Best Film & Video Corporation. This bill is co-sponsored by Mrs. Fred Astaire, who was recently involved in a difficult and expensive lawsuit over the unauthorized use of her husband's image in a "how to" dance video. (It is important for Committee members to note that this lawsuit did not involve the relatively recent commercial showing Fred Astaire dancing with a vacuum cleaner, contrary to many individuals' assumptions. That use clearly required consent under current law, which, according to her representative, was granted by Mrs. Astaire.)

Summarizing the relevant facts in the Astaire case, the Ninth Circuit Court of Appeals stated:

> In 1965, Fred Astaire granted the Ronby Corporation an exclusive license to use his name in connection with the operation of dance studios, schools, and related activities. Astaire also granted Ronby the right to use certain pictures, photographs, and other likenesses of himself . . . as well as any new photographs and likenesses that he approved in writing.
>
> Twenty-four years later, Best entered into an agreement with Ronby to produce a series of dance instructional videotapes using the Fred Astaire Dance Studios name and

> licenses. Since October 1989, Best has been manufacturing and distributing a series of five videotapes known as the "Fred Astaire Dance Series." . . .
>
> The videotape itself begins with an introductory segment. After Best's logo is shown, the title "Fred Astaire Dance Studios Presents How to Dance Series" appears on the screen. Then, before any other footage or narration, the videotape contains about ninety seconds of footage from two of Astaire's films – Second Chorus and Royal Wedding – in which Astaire is shown dancing alone and with a partner. . . .Some still photographs of Astaire follow, and then a narrator appears on a stage adorned with more Astaire photographs. The narrator then introduces the series and the instructional portion of the video.

Mrs. Astaire sued Best Video alleging that the videotapes violated her rights under Section 990 by using her deceased husband's image, without her permission, in the videotape clips from Second Chorus and Royal Wedding at the beginning of the "how to" dance video. The Court held that Section 990's list of exemptions, which included the term "film," extends to Best Video's use of "videotape." The Court also noted that simply determining that videotape is included in the list of exemptions was not sufficient, because section 990 prohibits the use of images in plays, books, films, etc. if they are merely advertisements or commercial announcements. Advertisements for the protected use itself remain protected.

Mrs. Astaire argued that the clips "are not connected to the learn-to-dance video and, therefore, are merely an advertisement for the video. She contends then that the advertisement is a distinct entity analytically, separate from the video." The Court found, however, that even if the clips were advertisements (a decision they stated they did not need to reach), they were advertisements for the video itself, advertisements protected both under Section 990 and the First Amendment.

In this case, Mrs. Astaire argued that the legislative history of California's descendible right to publicity creates only a limited exception, for "legitimate historical, fictional, and biographical accounts of deceased celebrities." However, the Court found no legislative history to support that contention, and instead found that Mrs. Astaire "is asking courts to make a content-based decision every time a filmmaker or author uses the name or image of a celebrity" to assess whether the use of the name or image is related to the content of the film or book, or "merely advertising to call attention to" the film or book.

Importantly, for purposes of the Committee's consideration of the issues raised in the Astaire case, the Court limited its holding in Astaire by stating that "our holding in this case is narrow and driven by the unusual facts that Astaire had licensed the use of his name to the dance studios and that the film clips of Astaire dancing, clips which were in the public domain, were used in a how-to-dance video."

The author argues persuasively, however, that the Court erred in focusing so greatly on the form (video) rather than the substance (commercial use) of the alleged misappropriation of Fred Astaire's image. He also notes that one court has already inappropriately followed the Astaire Court's narrowing of the rights of heirs of deceased celebrities.

This legislation therefore appropriately raises the question of whether California courts are properly interpreting the Legislature's intent behind California's descendible right to publicity statute, and it answers it in the negative, suggesting substantial revisions to that law.

Comparing the Right to Publicity of Living Celebrities and the Right to Publicity Passed Down to Heirs of Deceased Celebrities. California Civil Code section 3344 creates the statutory right to publicity for living personalities, imposing liability on any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without prior consent. There is no specific list of exemptions for film, books, plays, magazines, etc. as is currently provided in the deceased celebrity statute, with the exception of the section's exemption for the use of a celebrity's image in connection with any news, public affairs, or sports broadcast or account, or any political campaign (an exception also built into the deceased celebrities statute).

The parallel section for deceased celebrities (section 990), however, specifically excludes from its reach the use of a deceased personality's image in a play, book, magazine, newspaper, musical composition, film, radio, or television program, in material of political or newsworthy value, single and original works of fine art, and any advertisement or commercial announcement of such uses.

This bill effectively seeks to bring these two statutes into greater conformity, eliminating the list of exemptions for deceased celebrities, and expanding the types of uses for which consent of the celebrity's heirs is required. The author states that "the current standard that applies to living celebrities has been in place for over 25 years. The constitution provides adequate protection for legitimate artistic uses, including movies, books, and plays."

Opponents note, however, that to the extent the living celebrity statute is "working," that is only because the entertainment industry is guided by other California laws which expressly protect living celebrities, namely invasion of privacy and defamation laws. Such laws do not yet inure to the benefit of heirs of deceased celebrities, and so, opponents argue, the list of exemptions gives necessary guidance about the types of works protected, and gives appropriate notice to all parties about their rights under the statute.

Opponents also contend that the list of exemptions provides certainty for the industry, and its removal will allow heirs to essentially control the direction and censor the content of productions, and the flow of virtually all information about deceased personalities -- under threat of litigation to determine whether the production can be made in the absence of the heir's consent.

The weighty policy question for this Committee to consider, therefore, is whether there are and should continue to be differences between the rights to publicity for living and deceased celebrities which justify continuing to make images of deceased celebrities more readily available without consent. As noted above, California law already makes distinctions between living and deceased celebrities, creating a right against defamation and invasion of privacy for the living, but not the deceased. One question challenging question opponents ask is "Who owns the right to history?" Is it the heir of the public figure whose image is to be used, or is it society as a whole? This is obviously not an easy policy question to answer, but this legislation seeks to ensure the heir has the leading role in the decision.

Extending the Descendible Right to Publicity From 50 to 70 Years After the Death of the Celebrity. Proponents of the bill argue that "this amendment is needed to effectuate the California Assembly's original legislative intent in enacting Civil Code section 990. A 100 year term of protection was originally proposed when present Civil Code section 990 was considered by the California Assembly in 1984. However, after discussion with opponents of that bill, it was agreed that the term of protection for the right of publicity would be co-extensive with the term of protection for copyright." The Assembly Judiciary Committee analysis of that measure notes that the 50 year time frame "is based on the Copyright Act of 1976, which provides a specific duration for copyrights: the life of the author plus 50 years after his death." The Committee analysis did not, however, argue for the need to mirror the term of protection under the federal copyright law, and in fact questioned "Is this duration a reasonable length of time? Should the general public have earlier access, e.g., after 20 years, to the names and likenesses of figures of public interest?"

The answers to those questions were obviously no, as the Committee approved the 50 year term. Proponents also note that "the U.S. Supreme Court recognized in Zacchini v. Scripps – Howard Broadcasting Co. [the only U.S. Supreme Court case to examine the right of publicity, that] the main rationale for the right of publicity, namely the encouragement of personal achievement to encourage creative activity for the ultimate benefit of society, is closely analogous to the rationale for copyright protection under the U.S. Constitution." (Citations omitted.)

This bill, therefore, seeks to conform California's descendible right to publicity statute to the recent amendments to the federal Copyright Act.

Controversy Over Role Current Cases on Appeal Should Play. As noted above, this bill addresses the deceased celebrity statute in three principal ways:

1) It extends from 50 to 70 years after the death of a celebrity the time in which consent may be required for the use of the celebrity's image.

2) It seeks to re-define the types of uses which are exempt from the consent requirements.

3) It seeks to re-define the breadth of cases to which California law may apply.

Presently, both provision #2 and #3 are the subject of pending review by high appellate courts.

An examination of the types of uses of a deceased celebrity's image which are and are not permitted under the existing statute is, for the first time, pending review by California's Supreme Court. In Comedy III Productions, Inc. v. Saderup Inc. (1998) 68 Cal.App.4th 744, the state court of appeal framed the issue before it as "concern[ing] the right of publicity, which involves the right to exploit one's name and persona commercially, and to restrict their commercial appropriation or exploitation by others." Although the specific issue in the case before the court was whether consent was required for defendant's selling of lithographed copies of a sketch of the likenesses of the Three Stooges, and T-shirts bearing reproductions of the charcoal sketch, the court focused its review on the broader issues of the meaning of "products, merchandise, or goods," and the distinction between using a celebrity's image to convey

an informational or other type of message or merely to sell a representation of that image. The scope of the California Supreme Court's decision in this case, therefore, very well may go to the heart of the matter this bill is seeking to address, namely, what uses do, and what uses do not, require consent of a deceased celebrity's heir.

A letter to the Assembly Judiciary Committee from several law professors expressing their opposition to this measure specifically targets this question, arguing forcefully that "this grant of review [by the California Supreme Court] argues for at least a significant delay in considering any changes to subsection (n) in order to give our Supreme Court a chance to provide guidance to the lower courts and to this Legislature about the appropriate line of demarcation between commercial and non-commercial uses."

The choice of law question addressed by this bill is also pending appeal, in this case before the federal Ninth Circuit. In Lord Simon Cairns v. Franklin Mint Company (1998) 24 F.Supp. 2d 1013, a California federal district court, examining whether California law could apply under the deceased celebrity statute, held that, although "California generally resolves conflict of law questions through a "governmental interest" analysis, [when the issue is personal property, which the right of publicity is] . . . the traditional common law rule dictates that personal property is generally controlled by the law of a decedent's domicile at the time of his or her death. This common law rule . . . has been recognized uniformly throughout California's history." (Id. at 1024 – 1026. Citations omitted.)

The author believes the lower federal court wrongly decided this case, and the choice of law provision in the bill will properly dictate that domicile at the time of death is irrelevant to the determination of whether California law is applicable. (This choice of law issue, and how to narrow the language of the bill in a manner that is consistent with the author's intention, is discussed in greater detail in Issue #2, below.)

The correspondence to the Assembly Judiciary Committee from the law professors noted above also addresses this question, asserting that "SB 209 (according to its author) is apparently intended to effect a prospective legislative overruling of a trial court decision currently pending appeal. In Lord Simon Cairns v. Franklin Mint Co., U.S. District Judge Richard A. Paez held that representatives of the late Princess Diana did not have enforceable post mortem rights of publicity because Diana was a domiciliary of the United Kingdom (a jurisdiction that recognizes no rights of publicity) at the time of her tragic death. However, Cairns is currently on appeal to the Ninth Circuit Court of Appeals. After the Ninth Circuit determines whether Judge Paez correctly or incorrectly applied existing law . . . the Legislature will have ample opportunity to determine for itself whether that existing law requires modification or amendment. Taking action to undo the results of a trial court decision that awaits appellate action is precipitous indeed."

ISSUE #1: DOES THE BILL'S ELIMINATION OF THE SPECIFIC LIST OF USES OF A DECEASED CELEBRITY'S IMAGE WHICH DO NOT REQUIRE CONSENT CREATE UNCERTAINTY AND HAVE THE UNINTENDED POTENTIAL OF CHILLING FREE SPEECH? As discussed more fully above, proponents note that eliminating the list in Section 990 simply conforms the deceased celebrity statute to the living celebrity statute. They argue that 25 years of experience with the living celebrity statute has demonstrated that the absence of the specific list of exemptions does not make such statutes unworkable or unclear, and that opponents' claims that it will breed litigation or allow heirs to effectively censor all materials are unfounded.

Proponents argue that "the present 'listing' of exempt works . . . is unnecessary. The right of publicity statute for living persons . . . has no 'listing' of exempt works . . . yet there has been no flood of unmeritorious litigation by living individuals attacking expressive works. The Ninth Circuit Court of Appeals has found that section 3344 properly protects First Amendment interests. . . .Further, there is already well developed case law establishing that, generally, expressive works are protected by the First Amendment, and such case law provides significant guidance regarding permissible and impermissible uses."

Proponents note their concern that the current list of exemptions "protects both too little and too much. The listing can provide too much protection for unauthorized exploitation of a deceased personality in listed exempt media [by exempting false uses of a celebrity's image simply because they are contained within one of the media included in the list of exemptions]. However, it also can provide too little protection for expressive works in other important ways, some of which cannot presently be anticipated" in light of the ever changing technology.

Opponents to this measure, including the law professors noted above, respond forcefully that the elimination of the "safe harbor" exemptions in the current deceased celebrities statute, however, and replacing them "with a general and inherently vague reference to freedom of speech and freedom of the press" will "leave artists, writers, directors and other creative forces . . . without any meaningful guidance or protection from frivolous lawsuits. Fear of such litigation, and its attendant costs, will certainly chill a vast array of protected expression." Opponents further note that "in its present form, Section 990 (n) strikes the right balance in preventing true commercial exploitation of deceased personalities, while at the same time minimizing restraints on creative expression. . . .The main effect of removing the clear and understandable categories will be to encourage excessive and ultimately chilling litigation, in which authors and producers are forced to defend or curtail their expressive choices." The Motion Picture Association of America argues that "this is not speculation. That effect has already been demonstrated in the frivolous cases brought under laws that lack clear exemptions, including . . . the right of publicity statute applicable to living persons. . . .The greater certainty afforded by current section 990, with its explicit exemptions . . . discourages excessive and inappropriate claims, provides the necessary 'breathing room' required in the creative and journalistic processes, and still provides adequate protection against unauthorized commercial exploitation."

Opponents further argue that, with regard to publicity rights, "there is no bright line rule for determining when a celebrity's name, voice, likeness, etc. may properly be used without having first secured that individual's permission."

The letter written to the Committee by the law professors noted above takes particular aim at the proposed language regarding the First Amendment, arguing that the language is unconstitutionally vague:

> Generally, a statute restricting speech is unconstitutionally vague if it is unclear what speech is permitted and what speech is not permitted. The vagueness doctrine is based upon the fundamental belief that all persons are entitled to know what conduct is

> proscribed. Thus, an unclear or indefinite law violates due process whenever it fails to provide fair notice of the behavior to avoid.
>
> Vagueness is of particular concern in the area of expression because vague statutes chill speech and ultimately affect the free exchange of ideas. Where a statute proposes to restrict speech, the United States Supreme Court has traditionally required great specificity. . . .
>
> The U.S. Supreme Court has previously rejected attempts to use the Constitution itself as a referent [as this bill does] in order to avoid such vagueness problems. . . .[C]ases have recognized that the statutory importation of First Amendment language renders that statute vague and meaningless. For example, in Rubin v. City of Santa Monica [examining a Santa Monica ordinance which provided that "a permit shall be used for any assemblage . . . such as a demonstration, rally or protest, organized for the purpose of conveying a political, religious, or other similar type of message protected by the California Constitution or the First Amendment of the United States Constitution], the court noted the 'peril' in drafting an ordinance with a First Amendment standard, explaining that its meaning is not self evident or easily discernible. . . .The Court asked: 'What are the protected activities, and what are nonprotected activities? What does the First amendment really mean?'

Proponents would likely contend, however, that the current protections for living celebrities has not fallen on this vagueness ground, and as the standard for deceased celebrities in this bill essentially co-opts that standard, they would likely argue the validity of this point.

If the Committee concludes that these legal scholars are correct in this concern, or decides that public policy does not demand that the rights of living celebrities and the heirs of deceased celebrities should be co-extensive, the Committee may wish to explore with the author the merits of amending the bill to delete the general reference to the First Amendment in subdivision (n) and instead amend page 2, lines 3 – 11 to read:

> Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. For purposes of this section, works of expression, including but not limited to fictional or non-fictional entertainment, dramatic, literary and musical works, shall not be considered products, merchandise, goods, or services, unless such works use a deceased personality's name, voice, signature, photograph or likeness in any of the following ways: (1) for the purpose of promoting, endorsing, advertising, selling, soliciting of, or the use in, a commercial product; (2) in a manner that has been created, altered or manipulated using digital technology now known or hereafter developed; or (3) in a manner which is false and known to be false, or with reckless disregard for the falsity of the use, where such use is portrayed as factual.

The author believes this proposed amendment is insufficient because it continues to provide, in the author's estimation, inadequate protections for the property rights of heirs. The author has informed the Committee that he may bring alternative language which, he argues, seeks to address the concerns raised by the opposition.

ISSUE #2: WILL THE BILL'S CHOICE OF LAW PROVISION WITHSTAND CONSTITUTIONAL SCRUTINY? The bill provides that "pursuant to the jurisdiction provided under Section 410.10 of the Code of Civil Procedure [California's long-arm jurisdiction statute], a plaintiff has standing to bring an action pursuant to this section if any of the acts giving rise to the action occurred in this state, whether or not the decedent was a domiciliary of this state at the time of death."

Notwithstanding the laudable goal of maximizing the use of the state's law in this area, this language may unfortunately be too broad to satisfy the U.S. Supreme Court's recent holding in BMW v. Gore (1996) 517 U.S. 559, which provided that "while we do not doubt that Congress has ample authority to enact . . . policy for the entire Nation, it is clear that no single state could do so, or even impose its own policy choice on neighboring States. (Id. at 571.) The Court further held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states. . . .[A state] does not have the power . . . to punish [individuals] for conduct that was lawful where it occurred and that had no impact on [that state] or its residents." (Id. at 572 - 573.)

The group of law scholars who wrote the Committee in opposition to this bill assert that "the constitutionality of [the choice of law provision in SB 209] is subject to serious question in light of the United States Supreme Court's decision in BMW v. Gore. . . .Under [SB 209], California extends the reach of its law into the overwhelming majority of states that do not even recognize a post mortem right of publicity and punishes the residents of those states for violating California law so long as but one of the acts giving rise to the action occurs in California. . . . [This bill] may well be seen as intending to create liability and impose damages for conduct that is lawful in other states. This is precisely the type of statute BMW v. Gore condemns. This is because, in the Supreme court's view, California may be reaching outside its boundaries to impose liability and damages for conduct in other states" that was in fact lawful where it occurred.

Proponents argue that BMW v. Gore is inapposite, however. They note that "the Supreme Court implicitly recognizes that a state's conflicts rules may give its law extraterritorial effect. A different rule would lead to absurd results in multistate tort settings. It would require a party who was injured by a multistate tort such as defamation, violation of the right of publicity, trademark infringement, etc. to either 1) file 50 different suits in 50 different states to recover damages, or 2) ask a single court to determine the applicable law of 50 states." This bill does not necessarily affect the ability to sue for "multistate torts," however. Proponents' argument side-steps the fact that only 10 – 15 states nationwide currently recognize a descendible right to publicity. The bill, therefore, arguably does not only allow the application of California law to tortious activities in other states, but also imposes liability for activities that may have been lawful in the state where they occurred or where the damage resulted.

Proponents also argue that the single publication rule and its expansive application, demonstrate that the opponents' interpretation of BMW v. Gore does not apply to the provisions of SB 209: "Virtually all U.S.

states, including California, have either a statutory or common law "single publication" rule. California's . . . provides that a plaintiff in an action for 'invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as one issue of a newspaper of book or magazine,' may recover 'all damages for any such tort suffered by the plaintiff in all jurisdictions. . . .The U.S. Supreme Court has approved use of the single publication rule. Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), affirmed application of the single publication rule to utilize New Hampshire's six year statue of limitations for defamation actions, even though 99% of the defamatory statements were made outside of New Hampshire in jurisdictions where the claims had expired under their own statutes of limitation. The New Hampshire statute of limitations was constitutional because it governed conduct that occurred within New Hampshire; the fact that it had extraterritorial affect under applicable conflicts of law rules did not make it invalid. SB 209 has the same effect. It insures that California law applies to California conduct that violates California's right of publicity of statute."

Proponents' arguments seem to miss several important facts, however. Most notably, this argument ignores the fact that the issue in the Keeton case was whether the New Hampshire Court could assert personal jurisdiction over the defendant. "Any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the court to adjudicate the claims. 'The issue is personal jurisdiction, not choice of law.' The question of the applicability of New Hampshire's statute of limitations to claims for out-of-state damages presents itself in the course of litigation, . . . we do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry." (Id. at 778.) Additionally, it is important to recall, nothing has been put forward to support the contention that the single publication rule is intended to confer upon an individual a right that is not recognized in the state in which the damage occurred.

The legislative history of SB 613, the measure that created the descendible right to publicity, also appears instructive on this choice of law question. Proponents of the bill point to those portions of the Assembly Judiciary Committee analysis of that earlier measure which provides that "to continue to encourage and perpetuate the entertainment industry in California, this state should continue to be a leader in protecting the rights of individuals." That sentence, however, concludes by specifically referencing "the publicity rights of its residents." SB 209 goes further than protecting the publicity rights of residents, protecting such property rights whether or not the decedent was, or the plaintiff is, a resident of California, whether any substantial act was committed in California, and whether any damages resulted in California.

In order to comply with the U.S. Supreme Court's pronouncements in BMW v. Gore, and to eliminate unnecessary references to "standing" and "jurisdiction" in this subdivision that appears to be limited to the "choice of law" issue (while at the same time preserving the author's intent in not limiting the bill's applicability to heirs of celebrities who were domiciliaries of California at the time of death), the Committee may wish to explore with the author the merits of amending the bill at page 6, lines 17 – 22 as follows:

> (o) ~~Pursuant to the jurisdiction provided under Section 410.10 of the Code of Civil Procedure, a plaintiff has standing to bring an action pursuant to this section if any of the acts giving rise to the action occurred in this state, whether or not the decedent was a domiciliary of this state at the time of death.~~ This section shall apply to the adjudication

of liability and the imposition of any damages or other remedies where such liability, damages, and other remedies arise from acts occurring directly in this state. For purposes of this section, acts giving rise to liability shall be limited to use on or in products, merchandise, or goods, or the advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by this section.

This approach appears to retain the sponsor's intent regarding this issue, since, according to the Screen Actors Guild, a co-sponsor of this measure, it was always their intention that this provision be limited to the "acts" defined above, and not any incidental acts related to such uses.

REGISTERED SUPPORT / OPPOSITION:

Support

Robyn Astaire (Co-sponsor)
Screen Actors Guild (Co-sponsor)
Artists Rights Foundation
California Labor Federation, AFL-CIO
CMG Worldwide
Consumer Federation of California
Directors Guild of America
A Minor Consideration
Service Employees International Union (SEIU)
Gloria Allred, Allred, Maroko & Goldberg
Mark Lee, Manatt, Phelps & Phillips
Thomas White, Artists Rights Consultant
SAG Members: Jane Alexander, Nancy Allen, Steve Allen and Jayne Meadows (Allen), Lucie Arnaz, Ed Asner, Hank Azaria, Barbara Bain, Clint Black, Lisa Hartman Black, Susan Blakely, Barbara Bosson, Bruce Boxleitner, Sandra Bullock, K Callan, Jack Carter, Nancy Cartwright, Dick Clark, Susan Clark, Glenn Close, Cindy Crawford, Michael Crawford, Tom Cruise, William Daniels and Bonnie Bartlett Daniels, Ted Danson, Ruby Dee, Bodhi Pine Elfman, Bill Erwin, Brad Garrett, Melissa Gilbert, Melanie Griffith, Veronica Hamel, Pat Harrington, Melissa Joan Hart, Charlton Heston, Catherine Hicks, Steven Hill, Hal Holbrook, Lauren Holly, Helen Hunt, James Earl Jones, Madeline Kahn, Alex Karras, Lainie Kazan, Stacy Keach, Nicole Kidman, Kevin Kilner and Jordan Baker-Kilner, Angela Lansbury, Tracy Marrow ("Ice T"), Marsha Mason, Richard Masur, Bruce McGill, Donna Mills, Rob Morrow, David Morse, Alan Rachins, Pamela Reed, Rob Reiner, Tim Robbins, Susan Sarandon, Tom Selleck, Jane Seymour, Ron Shelton, Brooke Shields, Phoebe Snow, Mary Steenburgen, Patrick Stewart, Patrick Swayze, Lily Tomlin, Robert Townsend, Mary Tyler Moore

Opposition

ABC, Inc
Alliance of Motion Picture & Television Producers
American Civil Liberties Union
American Film Marketing Association

Arnold & Associates
Artisan Entertainment Inc.
Association of American Publishers, Inc.
Professor Stephen R. Barnett, Boalt Hall School of Law
California Cable Television Association
CBS Broadcasting Inc.
CBS Entertainment
Professor Erwin Chemerinsky, USC Law School
Columbia Pictures
Delaware Pictures, LLC
Professor F. Jay Dougherty, Loyola Law School
Entertainment Industry Development Corporation
Eye Envision Entertainment
Fox Broadcasting Company
Guggenheim Productions Inc.
Hollywood Chamber of Commerce
Home Box Office
IFM Film Associates, Inc.
IFP/West
KMIR-TV (NBC affiliate)
KNBC (NBC affiliate)
KNSD (NBC affiliate)
KSBW (NBC affiliate)
KSEE (NBC affiliate)
Latin Heat
Leonard Hill Films
Los Angeles Area Chamber of Commerce
Los Angeles County Bar Association
Los Angeles County Bar Association, Intellectual Property and Entertainment Law Section
Professor Michael Peter Madow, Brooklyn Law School
Magazine Publishers of America
Professor Karl M. Manheim, Loyola Law School
Marquee Entertainment
Media Coalition Inc.
Metro-Goldwyn-Mayer Studios Inc.
Moonstone Entertainment
Motion Picture Association of America
National Association of Theatre Owners of California/Nevada
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Walt Disney Company
Warner Bros.
WB Television Network
Professor Gary Williams, Loyola Law School
WIN Ventures, LLC.
Various Individuals

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